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In the

Supreme Court of the United States

October Term, 1997

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a species' potential impact on "biodiversity," and the possibility that commerce may be affected by "biodiversity," constitute a sufficiently substantial effect upon interstate commerce such that the federal government may regulate all activities affecting that species under its Commerce Clause powers?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF)[1] is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. Over 25,000 individuals, organizations, associations, and corporations support PLF's efforts nationwide.

PLF has participated in numerous cases concerning the interpretation of the Commerce Clause, as well as cases relating to the Endangered Species Act. For example, PLF participated as amicus curiae before this Court in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981); *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407 (1995); and *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

Amicus seeks to augment the arguments of Petitioners that this Court's additional guidance is critical to understanding and applying the limitations imposed by the Commerce Clause as a grant of authority to the federal government.

INTRODUCTION

Article I, Section 8, Clause 3, of the United States Constitution is a grant from the people of this country to Congress of the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In the years since our Constitution was drafted, the increased ability to communicate among, travel to, and trade with people in all parts of our nation and the world has been accompanied by a corresponding increase in the number of

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

activities that the federal government has sought to regulate under its commerce power, so that federal power touches many aspects of our lives. Unfortunately, this expansion of federal power has encouraged many in our federal government, particularly executive agencies, to operate on the presumption that federal power is without any limitations at all.

One such agency is the United States Fish and Wildlife Service. Under the Endangered Species Act of 1973, Fish and Wildlife is engaging in widespread federal land use regulation of private property to protect species listed as endangered or threatened. Although Congress enacted the Endangered Species Act pursuant to its Commerce Clause powers, neither the Act nor Fish and Wildlife's own regulations or practices require that there be any connection between the activity being regulated under the Endangered Species Act and interstate commerce.

This case is a challenge to Fish and Wildlife's assertion of broad regulatory authority. To validate its actions, the court below supplied the justification that, because wildlife contributes to the biodiversity of the earth's ecosystems, upon which all things, including commerce, depend, the federal government can regulate *all species*, because all species impact the earth's biodiversity. This finding that Congress can regulate based upon theoretical, speculative, or potential impacts upon commerce directly contravenes the jurisprudence of other circuits and this Court's decision in *United States v. Lopez*.

Petitioners ask this Court to resolve whether the decision of the court below comports with our constitutional framework. Under the rationale supported by the court below, the federal government is able to regulate a swimming pool because *all* water affects interstate commerce, and regulate a flower bed because the aggregate impact of all flower beds *may some day* have a substantial effect on interstate commerce. And while the federal government does not directly regulate swimming pools and flower beds, the facts of this case demonstrate that the Fish

and Wildlife Service is purporting to use the Endangered Species Act to regulate such things to the minutest degree.

STATEMENT OF THE CASE

In 1993, the Secretary of Interior listed the Delhi Sands Flower-Loving Fly as an endangered species under the Endangered Species Act, 16 U.S.C. § 1531, *et seq*. *National Association of Home Builders v. Babbitt*, 130 F.3d 1041, 1060 (D.C. Cir. 1997) (*NAHB*) (Sentelle, J., dissenting). This fly exists only within the State of California. *Id.* Indeed, the United States Fish and Wildlife Service admits that the fly exists only in 40 square miles of Southern California--on small patches of land covered with a fine sand known as "Delhi sand." *Id.* at 1043, 1060.

According to the Fish and Wildlife Service, the fly spends the majority of its two-year life span--over 1 year and 10 months--in the pupal stage, underneath the Delhi sand. *Id.* at 1060. It emerges in its adult stage during the late summer months to breed and feed. *Id.* The fly exists only in small "colonies." In fact, this litigation commenced over Fish and Wildlife's protection of a single colony of eight flies. *Id.*

Federal protection of the fly has disrupted the operations of two cities and the County of San Bernardino (County), as well as the development plans of numerous private property owners. In particular, the Fish and Wildlife Service listed the fly one day before construction on San Bernardino's county hospital was slated to begin. *Id.* As a result, the Service compelled the County to relocate the hospital 250 feet north of its original building site, claiming that proceeding as planned would result in the unlawful "take" of an endangered species. *Id.* This relocation caused a one year delay in the hospital's construction and cost the County's taxpaying citizens an additional $3.5 million in building costs. *Id.*

For additional mitigation, Fish and Wildlife also demanded that the County set aside over eight acres of land from the

original hospital site as fly habitat. *Id.* Attached to this dedicated plot, Fish and Wildlife had the County create a 100-foot wide "fly corridor." *Id.* at 1044. In theory, the flies will choose this route to migrate to other suitable habitat during their short lives above ground. *Id.* at 1044-45. Because of Fish and Wildlife's insistence on preserving this artificial corridor without modification, the County's efforts to redesign a highway intersection to accommodate hospital traffic have been stymied. *Id.* at 1045.

Delay and redesign of the hospital and its related intersection are but a few of the impacts that have resulted from Fish and Wildlife's implementation of the Endangered Species Act. A Fish and Wildlife representative originally demanded that nearby Interstate 10 close down during the flies' "active" period in August and September. *Id.* at 1060. But, this demand was eventually withdrawn. *Id.*

The court below upheld Fish and Wildlife's regulation of this local species under the Endangered Species Act as a legitimate exercise of the authority to regulate interstate commerce. However, the court did not require that Fish and Wildlife make an individualized determination that the species substantially affects interstate commerce. Rather, it is enough, the court held, that a species contribute to general biodiversity, since biodiversity itself substantially affects interstate commerce.

SUMMARY OF ARGUMENT

The Petitioners have filed their petition asking this Court to review whether the need for species "biodiversity" provides a sufficiently substantial effect upon interstate commerce such that the federal government may regulate matters affecting species under its commerce power. Although the court below answered this question in the affirmative, the majority of the three-member panel could not agree on why this was so. However, both judges who sustained the jurisdiction of

the United States Fish and Wildlife Service did so on the basis that theoretical, potential, and speculative effects upon commerce were sufficient to confer federal jurisdiction under the Commerce Clause.

This finding that federal agencies may regulate based upon potential or speculative, rather than actual and specific, effects upon commerce, directly conflicts with the decisions of this Court and of other circuits. Specifically, the Fourth Circuit, in applying this Court's decision in *United States v. Lopez*, 115 S. Ct. 1624, held that a federal agency could not invoke jurisdiction where no commerce nexus was directly established. Furthermore, the decision of the court below conflicts with pre-*Lopez* decisions of the Seventh and Ninth Circuits, which required the federal government to demonstrate an actual and specific connection with interstate commerce before a federal agency could assert jurisdiction over local land use activities. To resolve these conflicts, and to give the lower courts guidance in understanding the limitation of the federal constitutional commerce power, this Court should grant the Petition for Writ of Certiorari.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER POTENTIAL OR SPECULATIVE EFFECTS ON COMMERCE ARE SUFFICIENT TO SUSTAIN FEDERAL REGULATORY AUTHORITY AFFECTING LOCAL LAND USE DECISIONS

The court below upheld Fish and Wildlife's exercise of authority to regulate activities affecting the endangered Delhi Sands Flower-Loving Fly. Specifically, the court held that all of the actions taken by Fish and Wildlife to protect the fly, including regulation of local land use activities, were valid

exercises of federal authority under the Commerce Clause. However, the two-member majority of the panel could not agree on a rationale. Judge Wald found that regulation of the fly could be sustained because it regulated the use of the channels of interstate commerce and regulated an activity that substantially affects interstate commerce. *NAHB*, 130 F.3d at 1046. Judge Henderson disagreed with Judge Wald that regulation of the fly regulated the use of the channels of interstate commerce, but agreed that regulation of the fly's habitat substantially affected interstate commerce. *Id.* at 1057-58. Judge Sentelle dissented, finding that regulation of the fly was invalid under the Commerce Clause because there was no connection between the fly and interstate commerce. *Id.* at 1061. Because Judges Wald and Henderson could not concur on why regulation of the fly is valid under the Commerce Clause, their opinions merit scrutiny.

Judge Wald found that regulation of the fly's habitat could be sustained because "the provision prevents the destruction of biodiversity and thereby protects the current and future interstate commerce that relies upon it." *Id.* at 1052.

In finding that "biodiversity" is the link between species protection and commerce, Judge Wald asserted:

> Each time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes. Unlike most other natural resources, however, the full value of the variety of plant and animal life that currently exists is uncertain. Plants and animals that are lost through extinction undoubtedly have economic uses that are, in some cases, as yet unknown but which could prove vitally important in the future. A species whose worth is still unmeasured has what economists call an "option value" --the value of the possibility that a future

> discovery will make useful a species that is currently thought of as useless. To allow even a single species whose value is not currently apparent to become extinct therefore deprives the economy of the option value of that species. Because our current knowledge of each species and its possible uses is limited, it is impossible to calculate the exact impact that the loss of the option value of a single species might have on interstate commerce.

Id. at 1053 (reference omitted). In other words, Congress has the authority to regulate endangered species because Congress believes that human ignorance is the only barrier to commercial relevance for *every* species.

The problem with sustaining federal regulation on these grounds is obvious. If Congress can regulate based upon theoretical or speculative impacts on commerce, the commerce power is without limitation or, rather, is limited only by the imagination of Congress. In *Lopez*, this Court specifically rejected a similar argument based upon future impacts on commerce when it rejected the government's "costs of crime" reasoning. The government asserted that the Gun Free School Zones Act was valid because the presence of guns in schools poses a threat to learning, which results in a less productive citizenry, and thereby affects commerce. This Court found this rationale faulty because such a power would not be "enumerated" at all, but would instead be limitless: "Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Lopez*, 115 S. Ct. at 1632. This Court pointed out, if Congress could regulate activities on the basis that those activities potentially affect future commerce, the court would be "hard-pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* In this case, the theoretical commercial impact endorsed by Judge Wald is not even tied to the activity being regulated. No

party to this case has alleged that the *fly itself* has a theoretical commercial value, only that *some indeterminate species* that may become extinct may prove to have commercial value *some time in the future*.

Indeed, Judge Henderson found fault with Judge Wald's conclusion that federal jurisdiction could rest upon future effects on commerce:

> [Judge Wald's] opinion acknowledges that it is "impossible to calculate the exact impact" of the economic loss of an endangered species. As far as I can tell, it is equally impossible to ascertain that there will be any such impact at all. It may well be that no species endangered now or in the future will have any of the economic value proposed. Given that possibility, I do not see how we can say that the protection of an endangered species has any effect on interstate commerce (much less a substantial one) by virtue of an uncertain potential medical or economic value.

NAHB, 130 F.3d at 1058. Notwithstanding this reasoning, however, Judge Henderson concluded that a species' existence has a *present* economic impact sufficient to sustain regulation of the fly based upon a theoretical link between species and commerce:

> The effect of a species' continued existence on the health of *other species* within the ecosystem seems to be generally recognized among scientists. . . . Given the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species (like the Delhi Sands Flower-Loving Fly) will therefore substantially affect *land and objects* that are involved in interstate commerce.

Id. at 1058-59 (emphases added). Like Judge Wald, Judge Henderson embraced the notion that Congress could regulate based upon a theoretical view--in this case, that some indeterminate species is essential to a given ecosystem, and that interstate commerce is dependent upon that ecosystem. However, Judge Henderson did not allege that the *fly itself* is essential, only that the fly could affect *other species* which may in turn affect *not* interstate commerce, but *land and objects* involved in interstate commerce.

A. The Decision of the Court Below, Finding That Congress Can Regulate Under the Commerce Clause Based upon Theoretical, Speculative, or Potential Effects Upon Interstate Commerce, Conflicts With the Fourth Circuit's Decision in *United States v. Wilson*

Though Judges Wald and Henderson could not agree on how and why "biodiversity" affects interstate commerce, both concluded that the federal government can regulate fly habitat because of a theoretical, speculative, or potential link between the fly's relevance to biodiversity and the impact of biodiversity on interstate commerce. However, the Fourth Circuit Court of Appeals has held that the Commerce Clause does not enable the federal government to exercise jurisdiction based upon potential or speculative impacts upon commerce.

On December 27, 1997, the United States Court of Appeals for the Fourth Circuit overturned the conviction of James J. Wilson, prosecuted under the Clean Water Act for filling a wetland without a permit, finding that the Army Corps of Engineers (Corps) had exceeded its authority by asserting jurisdiction over wetlands based upon their potential effects upon interstate commerce. *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

James J. Wilson has been developing a planned community in St. Charles, Maryland, since 1968. *Id.* at 254. In concert with county and federal housing authorities, Mr. Wilson engaged in

many land altering activities, including draining and grading property. *Id.* In 1992, the Corps issued a cease and desist order to Mr. Wilson, claiming that he had filled a wetland without a permit in violation of the Clean Water Act. *Id.* at 255. In a jury trial, Mr. Wilson was convicted and sentenced to 21 months in prison with one year of supervised release, and fined $1 million. *Id.* at 254.

On appeal, Wilson claimed that the Corps had no jurisdiction over the lands upon which he had conducted his draining and grading activities because they bore no relation to interstate commerce. *Id.* at 253. Specifically, he challenged the validity of the regulation under which the Corps asserted jurisdiction. The Clean Water Act prohibits the discharge, without a permit, of pollutants into "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12)(A). The Act defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). This Court understood that, by defining "navigable waters" to mean "waters of the United States," Congress intended to regulate some waters which are not considered "navigable" as that term is normally understood. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). However, the Army Corps of Engineers and the Environmental Protection Agency (EPA) further defined "waters of the United States" to include:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which *could affect* interstate or foreign commerce.

33 C.F.R. § 328.3(a)(3) (1993) (emphasis added). The Fourth Circuit found this broad assertion of jurisdiction invalid:

> This regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, nonnavigable, or both, solely on the basis

> that the use, degradation, or destruction of such waters *could affect* interstate commerce. The regulation requires neither that the regulated activity have a *substantial* effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate waters. Were this regulation a statute, duly enacted by Congress, it would present serious constitutional difficulties, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause. . . . Absent a clear indication to the contrary, we should not lightly presume that . . . Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner.

Wilson, 133 F.3d at 257 (emphases in original). The Fourth Circuit struck the regulation, stating that the Corps' promulgation of the regulation exceeded its congressional authorization under the Clean Water Act. The government's petition for a rehearing was denied.

The exercise of federal jurisdiction by the Fish and Wildlife Service in this case is a direct parallel to the exercise of federal jurisdiction by the Army Corps of Engineers in *Wilson*. Nonetheless, the Fourth Circuit flatly rejected the idea that federal jurisdiction could be based upon speculative and potential effects upon commerce, rather than actual effects. Indeed, it is impossible to formulate a rational distinction between the cases that could explain the divergent results: if "biodiversity" is sufficient to confer jurisdiction over a species, the regulation of *any water*, upon which all life, and therefore all commerce, unquestionably depends, can hardly be beyond federal jurisdiction under the Commerce Clause.

This Court should grant the Petition for Writ of Certiorari to resolve the conflict between the Fourth Circuit and the District of Columbia Circuit as to whether speculative or potential effects

upon commerce are sufficient to sustain federal authority under the Commerce Clause.

B. The Seventh and Ninth Circuits Have Held That Federal Agencies Must Demonstrate an Actual and Specific Connection to Commerce in Order for Federal Agencies to Exercise Jurisdiction Under the Commerce Clause

The opinion below, which bases its commerce finding upon the notion that other species do or could affect interstate commerce, is also in conflict with opinions of the Seventh and Ninth Circuits requiring federal agencies to establish specific federal jurisdiction when attempting to regulate private land use. These circuits require that the federal regulatory agency demonstrate an *actual* connection between the regulated activity and a substantial impact on interstate commerce. In *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 999 F.2d 256, 259 (7th Cir. 1993), and *Leslie Salt Co. v. United States*, 55 F.3d 1388,1392 (9th Cir. 1995), *cert. denied, Cargill, Inc. v. United States*, 116 S. Ct. 407 (1995) (both decided prior to *Lopez*), these Courts of Appeals addressed whether the federal government could assert jurisdiction under the Clean Water Act over isolated wetlands located on private property.

In *Hoffman Homes*, a developer filled a small wetland area in order to develop his property commercially. *Hoffman Homes*, 999 F.2d at 258. At issue was whether the EPA had jurisdiction consistent with the Commerce Clause to regulate the filling of an isolated wetland--that is, a wetland not connected to any interstate body of water. *Id.* at 260. The EPA argued that the connection between the wetland and interstate commerce was that wetlands serve as habitat for migratory birds, and that "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds." *Id.* at 261. Though accepting this dubious commerce connection, the Seventh Circuit nonetheless concluded that the isolated wetland

was not subject to EPA jurisdiction because it found "the conclusion of EPA's [Chief Judicial Officer] that Area A was suitable for migratory bird habitat to be unsupported by substantial evidence on the record as a whole." *Id.* at 262. The result of this decision was to require EPA to demonstrate that the specific regulated site was actually used by migratory birds. Potential use, or use by migratory birds of wetlands in general, was insufficient to validate application of the regulation. Instead, EPA had to show that the specific wetland in dispute substantially affected interstate commerce.

However, unlike the court in *Hoffman Homes*, the court below in this case accepted the very arguments rejected by the Seventh Circuit as untenable. Here, Fish and Wildlife argued that its general authority to regulate wildlife under the Endangered Species Act enables it to extend its jurisdiction to Delhi Sands Flower-Loving Fly habitat, whether or not the fly affects interstate commerce. Under *Hoffman Homes*, Fish and Wildlife's authority to regulate *some* wildlife and *some* activities does not empower the government to regulate *every* activity related to wildlife without demonstrating a case-specific impact on interstate commerce. Further, while EPA could not simply aggregate "all wetlands" into a class to validate its jurisdiction, Fish and Wildlife here contends that it may aggregate every variety of wildlife to demonstrate a substantial effect on commerce. The decision below conflicts with the Seventh Circuit's requirement that a federal regulatory agency must show an actual and specific connection between an activity and interstate commerce.

In *Leslie Salt*, the Ninth Circuit reached essentially the same conclusions as the Seventh Circuit in *Hoffman Homes*. In *Leslie Salt*, the issue was whether, under the Clean Water Act, the Army Corps of Engineers could prohibit the filling of evaporation pits the company had created for salt manufacture. *Leslie Salt*, 55 F.3d at 1390-91. Though the Ninth Circuit accepted the Army Corps of Engineers' "migratory bird"

argument (conceding that it "tests the limits of Congress' commerce powers and, some would argue, the bounds of reason," *id.* at 1396), it also acknowledged that the Corps' jurisdiction depended upon "the property's *specific connections to interstate commerce* due to migratory bird use." *Id.* at 1392 (emphasis added). Justice Thomas underscored the burden that the government must show to assert jurisdiction under the Commerce Clause:

> [T]hat substantial interstate commerce depends on the continued existence of migratory birds does not give the Corps *carte blanche authority to regulate every property that migratory birds use or could use as habitat.* The point of *Lopez* was to explain *that the activity on the land to be regulated must substantially affect interstate commerce* before Congress can regulate it pursuant to its Commerce Clause power.

Cargill, Inc., 116 S. Ct. at 409 (Thomas J., dissenting from the denial of certiorari) (emphases added).

In *Hoffman Homes* and *Leslie Salt*, the government was not entitled to exercise jurisdiction over a specific wetland on the basis of a wetland's potential effect on commerce, nor could the government rely on its authority to regulate wetlands in general. The federal government was required to demonstrate a connection between the *actual, specific activity being regulated* and its *effect on interstate commerce* in order to sustain jurisdiction. These holdings are in direct conflict with the decision of the court below, which held that theoretical, speculative, or potential effects on interstate commerce are sufficient to confer federal jurisdiction under the Commerce Clause.

CONCLUSION

Congress has numerous means at its disposal to regulate interstate commerce in wildlife. It employed some of those means in Section 9 of the Endangered Species Act. However, no matter how lofty the goal, Congress may not reach beyond its constitutionally enumerated powers. Specifically, this Court has never countenanced the proposition that Congress could use theoretical, speculative, or potential effects upon commerce as a basis for exercising sweeping federal jurisdiction.

The court below held that the federal government need not demonstrate a connection between an activity being regulated and its effect upon interstate commerce. Rather, the court held that a theoretical link between the activity being regulated and interstate commerce was sufficient to confer federal jurisdiction. Because the decision of the court below conflicts with the Fourth, Seventh, and Ninth Circuits' understanding of federal jurisdiction under the Commerce Clause, and this Court's precedent in *United States v. Lopez*, this Court should grant the Petition for Writ of Certiorari.

DATED: April, 1998.

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